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In The  
**Supreme Court of the United States**  
October Term, 1987

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BERNARD SNYDER,

*Petitioner,*

v.

THE PENNSYLVANIA JUDICIAL INQUIRY  
AND REVIEW BOARD,

*Respondent.*

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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**COUNTERSTATEMENT OF QUESTIONS  
PRESENTED**

- I. Whether the decision of the Pennsylvania Supreme Court sanctioning a Judge for violations of the Code of Judicial Conduct should be reviewed for conflict with this Court's holding in *Brady v. Maryland* when the issue of petitioner's access to exculpatory evidence was neither raised in nor considered and resolved by the Pennsylvania Supreme Court and was not raised by the record below?
- II. Whether a finding that a Judge violated the Code of Judicial Conduct by presiding over his own recusal proceedings in which he appeared as a material witness, ruled on objections to his own testimony and, of necessity, would be required to assess his own credibility is subject to review on due process grounds based on a claim that prior Pennsylvania cases gave inadequate notice that so presiding could be considered a violation of the Code of Judicial Conduct?

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**OPINIONS BELOW**

The opinion of the Pennsylvania Supreme Court, which is published at — Pa. —, 523 A.2d 294, and was filed March 20, 1987, appears as the Appendix to the Petition.

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## **JURISDICTION**

The judgment of the Pennsylvania Supreme Court was entered on March 20, 1987. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

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## **CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED**

Pennsylvania Constitution, Article V, Section 17, provides in pertinent part:

(b) Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court. Justices of the peace shall be governed by rules or canons which shall be prescribed by the Supreme Court.

Pennsylvania Constitution, Article V, Section 18, provides in pertinent part:

(a) There shall be a Judicial Inquiry and Review Board having nine members as follows: three judges of the Court of Common Pleas from different judicial districts and two judges of the Superior Court, all of whom shall be selected by the Supreme Court; and two non-judge members of the bar of the Supreme Court and two non-lawyer electors, all of whom shall be selected by the Governor.

(d) Under the procedure described herein, any justice or judge may be suspended, removed from office or otherwise disciplined for violation of section 17 of this article, misconduct in office, neglect of duty, failure to perform his duties, or conduct which prejudices the proper administration of justice or brings

the judicial office into disrepute and may be retired for disability seriously interfering with the performance of his duties.

(e) The board shall keep informed as to matters relating to grounds for suspension, removal, discipline, or compulsory retirement of justice or judges. It shall receive complaints or reports, formal or informal, from any source pertaining to such matters, and shall make such preliminary investigations as it deems necessary.

(f) The board after such investigation, may order a hearing concerning the suspension, removal, discipline or compulsory retirement of a justice or judge. The board's orders for attendance of or testimony by witnesses or for the production of documents at any hearing or investigation shall be enforceable by contempt proceedings.

(g) If, after hearing, the board finds good cause therefor, it shall recommend to the Supreme Court the suspension, removal, discipline or compulsory retirement of the justice or judge.

(h) The Supreme Court shall review the record of the board's proceedings on the law and facts and may permit the introduction of additional evidence. It shall order suspension, removal, discipline or compulsory retirement, or wholly reject the recommendation, as it finds just and proper. Upon an order for compulsory retirement, the justice or judge shall be retired with the same rights and privileges were he retired under section 16 of this article. Upon an order for suspension or removal, the justice or judge shall be suspended or removed from office, and his salary shall cease from the date of such order. All papers filed with and proceedings before the board shall be confidential but upon being filed by the board in the Supreme Court, the record shall lose its confidential character. The filing of papers with and the giving of testimony before the board shall be privileged.

(j) The Supreme Court shall prescribe rules of procedure under this section.

Canon 3 of the Code of Judicial Conduct prescribed by the Supreme Court of Pennsylvania provides in pertinent part:

**A Judge Should Perform the Duties of His Office  
Impartially and Diligently**

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

C. Disqualification

(1) The judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

(d) he . . .

(i) is a party to the proceeding, . . .

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

## COUNTERSTATEMENT OF THE CASE

The Petitioner was a Judge of the Court of Common Pleas, a trial court of general jurisdiction, in Philadelphia County, Pennsylvania. The respondent, the Judicial Inquiry and Review Board, is charged by the Pennsylvania Constitution with the responsibility and authority to investigate matters relating to grounds for the discipline of Judges and, if, after a hearing on such matters, it finds good cause therefor, it is mandated to recommend appropriate discipline to the Pennsylvania Supreme Court which, following its own *de novo* review of the record of the Board's proceedings, determines what disciplinary action, if any, is appropriate, see Pennsylvania Constitution, Article V, Section 18(e)-(h), *supra*, p. 3.

As set forth in the Opinion Below, in this matter, the Board recommended that the petitioner be removed from judicial office based on its findings that, in a libel action tried before petitioner without a jury<sup>1</sup>, the petitioner had (Pet. App. p. A-3):

. . . held frequent *ex parte* conferences with counsel for the plaintiff without informing defense counsel; that these discussions centered on the evidentiary and other legal issues involved in this bench trial; that [petitioner] permitted both counsel to engage in unprofessional conduct during the trial, without sanction or disciplinary action; that [petitioner] entered an exceptionally large award of damages for the plaintiff without an evidentiary hearing and based those damages on information obtained outside the record and that [petitioner] presided at a hearing on a motion

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<sup>1</sup>See *Municipal Publications v. Court of Common Pleas*, 507 Pa. 194, 489 A.2d 1286 (1985).

for his own recusal, acting simultaneously as judge and as witness.

As required by the state Constitution, see pp. 2-3, *supra*, the Board filed with its recommendation the record of the formal proceedings. As noted by petitioner in his written objections to the recommendation, the Board record consisted of approximately 2,000 pages in 8 volumes and 87 volumes of the underlying trial record and 27 volumes of the recusal proceedings which were made a part of the Board's record.

The Pennsylvania Supreme Court, following its *de novo* review of the record created by the Board, found that the evidence of petitioner's derelictions was clear and convincing. The Court also found that the cumulative effect of such derelictions was so serious that the Board's recommendation of removal of petitioner from judicial office would be the only appropriate sanction (Pet. App. pp. A-9-10)<sup>2</sup>.

Prior to the initiation of the formal proceedings before the Board which led to its recommendation, petitioner, through his then counsel, filed a number of motions and requests with the Board, one of which referred to access to evidence held by the Board. In that motion, set forth as Appendix I, *infra*, petitioner moved for production and inspection of "all materials which are contained in the files of the . . . Board concerning this matter." The Board responded by letter dated January 17, 1984, from its Execu-

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<sup>2</sup>The Court had also held, prior to its decision in this matter, that petitioner was disqualified from ruling on the recusal motion in the underlying libel case and had remanded the matter to another judge, see *Municipal Publications v. Court of Common Pleas* cited in footnote 1, *supra*.

tive Director. This response, which is set forth as Appendix II, *infra*, denied petitioner's request for discovery of "the materials contained in the Board's file . . . at this time." The response also stated that "it undoubtedly will be the policy of the board to advise you of exculpatory information which has come to the attention of the Board." (App. II, *infra*, pp. A3-A4).

As noted, following the completion of formal proceedings, the Board filed with the Pennsylvania Supreme Court the Board's recommendation that petitioner be removed from judicial office. Petitioner, pursuant to the applicable procedural rules, filed a petition seeking rejection or modification of the Board's recommendation and a brief in support of said petition.

The petition and brief raised only one issue relating to the disclosure of information by the Board. This issue challenged the Board's statement that it had conducted an investigation on its own motion and was based on information presented in the hearing that attorneys and parties in the underlying litigation had sent the motion for recusal and supporting documentation to the Board.

Subsequent to the filing of the Board's recommendation, a petition for a writ of mandamus was also filed by petitioner seeking access to documents in the Board's files. That petition sought an order making available the Board's entire file concerning petitioner. This petition also referred to the fact that a witness testified at the Board hearing that he had filed a complaint against petitioner and referred to petitioner's belief that others filed such complaints.

In opposing petitioner's request for a Writ of Mandamus, the Board stated, in part, that:

What Petitioner is attempting to do, through his request for a writ of mandamus, is to obtain documents which in any other judicial proceeding would be unavailable. He is attempting to obtain the investigative files of the Board, regardless of whether they were used against him, letters and memoranda of the members of the Board which may indicate the thought processes of the members of the Board involved in the decision making, as well as information confidentially submitted to the Board but determined by the Board to be irrelevant or immaterial to the proceedings at hand. None of these documents can legitimately be considered part of the record and subject to disclosure. What is part of the record is what is required by [the Board's rule] to be disclosed: The findings, conclusions, and recommendations of the Board, and the transcript and accompanying exhibits forming the basis for the findings, conclusions, and recommendations. The Board's decision and recommendation must stand or fall based upon this record, regardless of what other information may have been submitted but not considered by the Board.

The Pennsylvania Supreme Court denied the petition for a writ of mandamus holding that its approval of the Board's petition to remove the petitioner from judicial office compelled such denial.

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### **SUMMARY OF ARGUMENT**

This is not an appropriate matter for review by this Court. Petitioner's claim that the decision of the Pennsylvania Supreme Court is in conflict with this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963) is patently not supported by the record. The issue of access to exculpatory evidence was neither raised in or considered by the Court below, and that the issue is not raised by the

record of the proceedings below. Moreover, even if we assumed, in the face of the clear record to the contrary, that a *Brady* issue was presented to the Court below, that issue was correctly decided.

Petitioner's other claimed basis for review by this Court, that sanctioning him for, *inter alia*, presiding over his own recusal proceeding in which he appeared as a material witness, ruled on objections to his own testimony and, of necessity, assessed his own credibility raises due process issues because he was without notice that such conduct could be grounds for sanctions is so obviously without merit that the fact that it is not grounds for certiorari is established by the mere statement of the issue. Moreover, the applicable Judicial Canons clearly put the petitioner on notice that such conduct is totally inappropriate and violative of the Judicial Canons.

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#### **ARGUMENT**

##### **I. THE PENNSYLVANIA SUPREME COURT'S DECISION DID NOT DENY PETITIONER ACCESS TO EXONERATORY EVIDENCE IN VIOLATION OF THIS COURT'S DECISION IN BRADY V. MARYLAND.**

Petitioner claims that the decision below is in conflict with this Court's decision in *Brady v. Maryland*, because the opinion of the ruling of the Pennsylvania Supreme Court is a "denial of the disclosure standards set forth by this Court" in *Brady* in judicial disciplinary proceedings and further claims that the ruling involves "wide ranging and grave ramifications" because almost all our states have a judicial inquiry and disciplinary procedure. But, the application of the *Brady* rule was never raised in the

Court below and was not considered or resolved by the Pennsylvania Supreme Court. Moreover, the record does not present the necessary factual predicate for a consideration of this issue. Moreover, even if it were assumed, *arguendo*, that the issue was presented by the proceedings below, the ruling of the Court is not in conflict with *Brady*.

**A. The Issue Of Access To Exculpatory Evidence Was Neither Raised In, Nor Considered by the Court Below.**

The record below does not support petitioner's claim that the Pennsylvania Supreme Court ruled on and denied his right to *Brady* material because he cannot demonstrate, as he must, *see Hill v. California*, 401 U.S. 797 (1971), *Exxon Corporation v. Eagerton*, 462 U.S. 176, at 181, n.3 (1983), that the question of his rights under *Brady* was either raised or considered and resolved below. Other than his repeated references to a request for disclosure of favorable evidence, references unsupported by citations to the record below, the only specific reference is to the petition for a writ of mandamus filed in the Court below. But that did not present the Court below with the issue raised here.

As set forth in the Counterstatement, the petition for a writ of mandamus sought access to the entire file of the Board concerning the proceedings below. Petitioner's Memorandum of Law supporting the petition for a writ is set forth as Appendix III, *infra*. That memorandum is devoid of any demand for *Brady* material, but rather demands the entire file on other grounds. Clearly, no request is made for evidence favorable to petitioner which is material either to guilt or punishment as is re-

quired by *Brady*, and the Pennsylvania Supreme Court was not asked to consider nor resolve whether the *Brady* standard is applicable in judicial disciplinary proceedings.<sup>3</sup>

**B. Neither The Decision Below Nor The Record Raises The Question Of Access To Exculpatory Evidence Raised In The Petition.**

Not only was the issue of the applicability of *Brady* to judicial disciplinary proceedings not raised or considered and resolved in the Court below, the record fails to provide an appropriate factual predicate for consideration of the issue. As noted above, the Board, at the very start of its proceedings, informed petitioner, through his counsel, that "it will undoubtedly be the policy of the Board to advise you of exculpatory information which has come to the attention of the Board," see counterstatement, p. 8, *supra* and the letter of January 17, 1984, set forth as Appendix II, *infra*. Thus, the Board, whatever may be the applicability of *Brady* to its proceedings, determined that it would provide petitioner with exculpatory evidence of which it became aware.

As also noted above, the record of the hearings in this matter consists of 2000 pages in 8 volumes. Petitioner, who was, of course, represented by counsel at these hearings had full opportunity to move for disclosure of evidence he felt was material to the issue of his violations of the judicial canons or to his punishment. Petitioner

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<sup>3</sup>Similarly, as set forth in the counterstatement, p. 7, *supra*, the petitioner did not raise the *Brady* issue in his objections to the Board's recommendation or in his brief in the Court below.

does not set forth any evidentiary request he made of the Board during the hearings that was not honored by the Board and, most important, does not set forth any objection made during the hearing on the basis of the non-production of evidence. Though referring to the petition for a writ of mandamus filed in the Pennsylvania Supreme Court after the Board's recommendation was filed, a petition seeking the Board's entire file, petitioner does not here specify what evidence was suppressed in violation of *Brady* requirements of being material to his guilt or innocence or to his punishment.

In short, the record does not provide an appropriate factual basis for consideration of the issue petitioner attempts to raise. Indeed, it does not present any basis for review of the issue.

**C. In Any Event, Even if We Assumed, Arguendo,  
That The Issue Is Presented By The Proceedings  
Below, Petitioners Argument Is Without Merit.**

As just discussed, petitioner both in the proceedings below and in his petition here has failed to demonstrate that the *Brady* issue was raised and has failed to specify the evidence that was suppressed that meets the *Brady* standard. However, even if we assumed, *arguendo*, that he had done so, an assumption unsupported by the record, he has failed to provide any basis for reversal of the ruling of the State Supreme Court, even if *Brady* were held to apply to judicial disciplinary proceedings. Therefore, review by this Court is not appropriate.

It is not sufficient for reversal under *Brady* to simply ask for the entire file and claim that the request was de-

nied,<sup>4</sup> it is necessary to establish, at the minimum, that the evidence suppressed might have affected the outcome, *U.S. v. Augurs*, 427 U.S. 97 (1976). Petitioner made no such claim below and makes no such claim here.

Again, Petitioner's only reference is to the petition for a writ of mandamus. The only evidence specified in that petition, other than the demand for the entire file, is information allegedly submitted to the Board by a witness at the hearings and that information is alleged to be a complaint to the Board based on the motion to recuse and the supporting documents which were filed in the underlying court case. Putting aside the consideration that the witness and the information were obviously available to the petitioner at the hearing, a consideration that itself is conclusive on this question, it is simply impossible to understand how it can be argued that such evidence, or similar evidence, might have affected the outcome below.

Thus, even if it were assumed that petitioner presented the Court below with the issue of the disclosure of evidence under *Brady*, the Court's refusal to grant the writ of mandamus has not been shown to be in error and review is not necessary nor appropriate.

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<sup>4</sup>Petitioner's request was not even a request for all exculpatory material or all *Brady* material, compare *U.S. v. Weiner*, 578 F.2d 757, 767 (9th Cir.) cert. denied, 439 U.S. 981 (1978).

**II. THE SANCTIONING OF PETITIONER FOR PRESIDING OVER HIS OWN RECUSAL PROCEEDING IN WHICH HE APPEARED AS A MATERIAL WITNESS, RULED ON OBJECTIONS TO HIS OWN TESTIMONY AND, OF NECESSITY ASSESSED HIS OWN CREDIBILITY, DOES NOT RAISE DUE PROCESS ISSUES.**

A part of the basis for the Board's recommendation below which was followed by the Court below that the petitioner should be removed from judicial office was his conduct in both presiding and testifying at the hearing on a motion for his recusal. Petitioner contends that sanctioning him for such conduct raises a due process issue because the conduct had never specifically been prohibited by the Pennsylvania Supreme Court until that Court did so in connection with the underlying case at issue, see *Municipal Publications v. Court of Common Pleas, supra*, 489 A.2d at 1288-89.

The mere statement of this issue should be sufficient to answer it. The impropriety of the conduct engaged in by petitioner is patent from the fact that this conduct violated one of the fundamental concepts of fairness, the well recognized principle that no one may be a judge in his own case. Petitioner should not be heard to argue that he needed a mandate from the Supreme Court to know that presiding over a proceeding in which he permitted himself as a witness and gave testimony concerning his own conduct, ruled on objections to his own testimony, and would be in a position to assess his own credibility in light of conflicting evidence, see *Municipal Publications, supra*, 489 A.2d at 1289, was improper.

But, even if petitioner needed such a mandate, the Court had provided it to him. The Pennsylvania Constitution provides that the State Supreme Court shall prescribe Canons of Judicial Conduct and that judges shall not violate those canons, see Article 17(b), *supra*, p. 2. The Code of Judicial Conduct promulgated by the Supreme Court in 1978 pursuant to this authority clearly informed Petitioner that his conduct was improper. Canon 1 requires a judge to "avoid impropriety and the appearance of impropriety in all his activities." The Canons require a judge to disqualify himself in a proceeding in which his impartiality might reasonably be questioned, see Canon 3, *supra*, p. 4.

More to the point, the Canon 3 specifies certain situations in which a judge should disqualify himself or herself. Among the situations specified are instances where (Canon 3C, *supra*, p. 4) :

- (a) he has . . . personal knowledge of disputed evidentiary facts concerning the proceedings;
- (d) he . . .
  - (i) is a party to the proceeding, . . .
  - (iv) is to the judge's knowledge likely to be a witness in the proceeding.

If common sense and our fundamental concepts of fairness did not put petitioner on notice that this conduct was improper, the Canons did. Petitioner's claim of a possible due process violation is frivolous. In any event, it does not require review by this Court.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. KEUCH

General Counsel

Judicial Inquiry and Review Board

*Counsel for Respondent*

**App. 1**

**APPENDIX I**

**JUDICIAL INQUIRY AND REVIEW BOARD**

**IN RE:**

**HONORABLE BERNARD SNYDER  
PETITION FOR INSPECTION AND PRODUCTION  
OF DOCUMENTS AND TANGIBLE THINGS**

Petitioner, Honorable Bernard Snyder, Judge of the Court of Common Pleas of Philadelphia County, by his counsel, Richard A. Sprague, Esquire, hereby moves for production and inspection of all materials which are contained in the files of the Judicial Inquiry and Review Board ("Board") concerning this matter, and in support thereof avers the following:

1. The Judicial Inquiry and Review Board is conducting an investigation concerning alleged conduct of Petitioner, as more specifically set forth in a letter to Petitioner dated November 2, 1983. The Board has appointed an Investigating Committee, which Committee intends to hold evidentiary proceedings under oath.
2. Petitioner is entitled to be represented by counsel at said proceedings. Counsel's effective representation requires discovery of the statements, interviews, testimony and other evidentiary items garnered by the Board, or its committees or staff, during its investigation. Absent the production of such materials, Petitioner will be irremediably prejudiced in that he will be foreclosed from any effective or meaningful participation in said hearings in violation of the rules of the Board and in contravention of his right to due process of law.
3. The Board has requested an answer from Petitioner to certain allegations specified in its letters dated

**App. 2**

November 2, 1983. To render said letters from the Board meaningful as notice to Petitioner of the charges pending against him, and to enable Petitioner to provide a meaningful response thereto, Petitioner requires the aforesaid discovery.

WHEREFORE, Petitioner requests the production of any and all witnesses' statements, investigatory notes, investigatory files, letters, memoranda, notes, transcriptions of testimony, tape recordings or other electronically produced memorializations of conversations obtained or otherwise secured in the course of the Board's investigation of matters concerning Petitioner, whether obtained formally or informally, directly or indirectly.

And Petitioner further requests that the Board grant said discovery and provide said materials to Petitioner not later than Friday, November 18, 1983, unless the Board determines to continue to a later date the evidentiary proceedings now scheduled for Tuesday, November 22, 1983.

Respectfully submitted,

Date: .....

RICHARD A. SPRAGUE (I.D. # 04266)  
STEVE ALEXANDER (I.D. # 31637)  
STEPHEN R. BASSER (I.D. # 23043)  
SPRAGUE & RUBENSTONE  
Suite 400, Wellington Building  
135 South 19th Street  
Philadelphia, PA 19103  
(215) 561-7681

COUNSEL FOR  
Honorable Bernard Snyder

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**APPENDIX II**

January 17, 1984

Richard A. Sprague, Esq.  
Sprague & Rubenstein  
135 South 19th Street  
Suite 400  
Philadelphia, PA 19103

Dear Mr. Sprague:

This Board met yesterday and considered your petitions and motions together with the memoranda of law submitted by you and by Mr. Miller.

The Board denied your petitions that

- (1) all hearings in the matter be public,
- (2) that Judge Snyder be provided with a more definite statement of the charges against him at this time.
- (3) that Judge Snyder be permitted discovery of the materials contained in the Board's file considering this matter at this time,
- (4) that Judge Snyder be permitted to argue individually or by counsel before the Board any of the Petitions, and
- (5) that Judge Snyder be permitted to disclose to counsel in pending cases his communication to and from the Board concerning those cases and to permit those counsel to attend JIRB proceedings which pertain to their cases. The prohibition against disclosure also pertains to you as counsel.

The Board will maintain transcripts of all Board discussions or proceedings in connection with the allegations, and will refrain from ex parte communications with Spe-

## App. 4

cial Counsel. I wish to advise you that there have not been any ex parte communications by the Special Prosecutor to the Board. Your Petition that the Board's staff be prohibited from engaging in communications with the Special Prosecutor was denied.

Your request for the right to cross examine witnesses at all evidentiary hearings conducted by the Board is denied in so far as the proceedings before the Investigating Committee are concerned.

It should be noted that if and when formal charges are brought, they will be phrased in specific language relating to the charges, and it will undoubtedly be the policy of the Board to advise you of exculpatory information which has come to the attention of the Board.

This will confirm our conversation of this date to the effect that the Investigating Committee will proceed with the taking of testimony on Wednesday, January 25, in these offices.

Sincerely,

/s/ Richard E. McDevitt  
Executive Director

REM/pq

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**APPENDIX III**

IN THE SUPREME COURT OF PENNSYLVANIA

In Re:	)	
	)	
HONORABLE BERNARD	)	JUDICIAL
SNYDER,	)	INQUIRY AND
Petitioner	)	REVIEW
	)	BOARD
v.	)	
	)	DOCKET —
THE JUDICIAL INQUIRY AND	)	
REVIEW BOARD,	)	
Respondent	)	

PETITIONER'S MEMORANDUM OF LAW  
IN SUPPORT OF HIS PETITION FOR A WRIT OF  
MANDAMUS AS WELL AS HIS THIRD  
APPLICATION FOR AN EXTENSION OF TIME

I. FACTS:

The Board has made its Report and Recommendation in the above matter.

When the Board originally informed Petitioner that the Board had instituted proceedings against Petitioner the formal pleadings designated that the proceedings had been assigned four (4) separate docket entries; specifically docket numbers 87, 88, 89 and 90 were assigned. Petitioner has made repeated demands upon the Board to explain the reasons behind the existence of four (4) separate docket entries in these proceedings. However, Petitioner's demands have never been satisfied.

Petitioner knows that David Marion, Esquire, has formally complained to the Board concerning Petitioner by reason of the fact that Mr. Marion so informed Peti-

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titioner in open Court. However, the Board has never advised Petitioner of Mr. Marion's complaint.

Upon information and belief one of the four (4) docket entries mentioned above was assigned as a result of Mr. Marion's complaint.

To adequately represent Petitioner in these as well as related legal proceedings, Petitioner's counsel subpoenaed the Board's entire file. The Board responded by seeking a Protective Order and a Motion to Quash the Subpoena. (See Exhibit "A.")

### **II. QUESTION PRESENTED:**

Is a Writ of Mandamus proper to compel the Board to make available to Petitioner, the Board's entire file concerning these proceedings?

### **III. ARGUMENT:**

A Writ of Mandamus is provided for in 42 Pa. C.S.A. § 721(2). The remedy of mandamus is an extraordinary writ which will issue to compel performance of a ministerial or mandatory duty where there exists a clear legal right in Plaintiff, a corresponding duty in the Defendant, and want of any other adequate and appropriate remedy. *Shaler Area School District v. Salakas*, 494 Pa. 630, 432 A.2d 165 (1981).

In the instant case the dictates of substantive and procedural due process manifest Petitioner's "clear legal right" to have complete access to the Board's entire file of this matter. The principles of due process in this regard are codified by the Rules of Procedure Governing the Board at Rule 1(b) which provides in pertinent part:

"The judge shall be notified of the investigation, the nature of the change, and the name of the person making the verified statement."

As stated above, this matter has been assigned four (4) separate docket numbers. In this regard, in the very least it is the "corresponding duty" of the Board to apprise Petitioner as to who and what stands behind the four (4) docket entries.

However, Petitioner will not stop here. It is Petitioner's position that he is entitled to review the entire file of the Board including the Board's investigative file.

As stated above, Petitioner's earlier efforts to obtain the materials sought herein met with the Board's request for a Protective Order as more specifically set forth in Exhibit "A."

A brief review of Exhibit "A" will demonstrate two facts. The first being that the Board has maintained a sizable body of material concerning these proceedings. The second fact is the Board has *sua sponte* determined that these materials need not be presented to this Honorable Court and has chosen not to make these materials a part of the "official record."

The Board has resisted Petitioner's attempts to have the Board's file produced on the grounds that the material is confidential (see Paragraph 10(a) on page 3 of Exhibit "A"). Simply stated, the Board's position in this regard is ludicrous. As this Court has noted, once the Board makes a recommendation the cloak of confidentiality is vitiated. *First Amendment Coalition v. Judicial Inquiry and Review Board*, 460 A.2d 722 (Pa. Super.

1983). Moreover, in the *Matter of D'Allessandro*, 397 A.2d 743 this Court described the *intent* of the Rules of Confidentiality as:

"Suffice it to say that the Rules [confidentiality] were adopted to prevent unfair and unwarranted premature conclusions to affect the public's confidence in the integrity and independence of the judiciary." *Matter of D'Allessandro, supra*, at 760.

It can no longer be said that confidentiality must be maintained so as to prevent premature public conclusions.

#### IV. CONCLUSION.

The Board's entire record must be made available to Petitioner. In that regard a Writ of Mandamus is proper. Lastly, Petitioner must have additional time to respond to the Board's Recommendation after such time as Petitioner has had the opportunity to review the Board's entire file of these proceedings.

Respectfully submitted

PECHNER, DORFMAN, WOLFFE,  
ROUNICK & CABOT

By: Kevin William Gibson

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IN THE SUPREME COURT OF PENNSYLVANIA

In Re: )  
HONORABLE BERNARD ) JUDICIAL  
SNYDER, ) INQUIRY AND  
Petitioner ) REVIEW  
 ) BOARD  
v. ) DOCKET NO. 108  
THE JUDICIAL INQUIRY AND )  
REVIEW BOARD, )  
Respondent )

CERTIFICATE OF SERVICE

I, KEVIN WILLIAM GIBSON, ESQUIRE, do hereby certify that I caused the copy of the foregoing Petition for a Writ of Mandamus to be served upon the offices of the Judicial Inquiry and Review Board at

1428 Three Penn Center Plaza  
Philadelphia, PA 19102

/s/ Kevin William Gibson

So certified this 9th  
day of September, 1985

/s/ Kevin William Gibson

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